No. 84-987

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IN THE

Supreme Court of the United States

October Term, 1984

JACK R. DUCKWORTH, Warden,
and INDIANA ATTORNEY GENERAL,

Petitioners,

v.

BERNARD WILLIAMS a/k/a
ANTHONY SHERRARD

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Seventh Circuit has decided this case in a way in conflict with controlling decisions of this Court, prevailing federal circuit court decisions and the decision of the Supreme Court of Indiana: 1) by ignoring the State Supreme Court's interpretation of the Indiana Habitual Offender Law and the state court factual findings; and 2) by finding insufficient evidence to support an habitual offender determination when a rational trier of fact could have found proof of guilt beyond a reasonable doubt under any reasonable construction of Indiana law.

TABLE OF CONTENTS

	Page:
Questions Presented for Review	i
Table of Authorities	iii
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	6
A. Nature of the Case	6
B. Course of Proceedings Below	6
C. Facts Material to the Consideration of he Question Presented	8
Reasons for Allowance of the Writ	10
Conclusion	18

TABLE OF AUTHORITIES

Cases: *Pages:*

Cramer v. Fahner, 683 F.2d 1376 (7th Cir. 1982) ... 11

Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 1568, fn. 21 (1982) 11

Green v. Massey, 706 F.2d 548 (5th Cir. 1983) 10

Harkins v. Wyrick, 589 F.2d 387 (8th Cir. 1979) .. 10, 11

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979) 15

Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198 (1982).. 7

Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764 (1981). 16

United States ex rel. Burnett v. People of the State of Illinois, 619 F.2d 668 (7th Cir. 1980) 10, 15

Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977) 11

Williams v. State, 424 N.E.2d 1017 (Ind. 1981)7, 9, 14, 16

Constitutional Provisions:

Fourteenth Amendment to the Constitution of the United States, Section 1 3

Statutes:

28 U.S.C. §1254 2

28 U.S.C. §2101 2

28 U.S.C. §2254 .....3, 15, 16

IC 35-4.1-4-2 (Burns 1979) 17

IC 35-50-2-8 (Burns 1979) 5, 12, 13

Rules:

Rule 17, Supreme Court of the United States 2

Rule 20.2, Supreme Court of the United States 2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Jack R. Duckworth and the Indiana Attorney General, respectfully pray this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit), entered in cause number 83-1158 on June 27, 1984, which reversed the judgment of the United States

District Court for the Northern District of Indiana, South Bend Division (hereinafter District Court).

OPINIONS BELOW

The Opinion of the Seventh Circuit issued on June 27, 1984, is officially reported at 738 F.2d 828, and a copy of said Opinion is appended hereto at page A-5. The December 28, 1982, Memorandum and Order of the District Court has not been officially reported. A copy of said Memorandum and Order, and the Judgment of the District Court is appended hereto at page A-23. The decision of the Indiana Supreme Court, which affirmed the habitual offender sentence in question, is reported at 424 N.E.2d 1017 (Ind. 1981) and is appended hereto at page A-32.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Rule 17.1(a) of the Rules of this Court, to review a decision of a federal court of appeals that has decided a federal question in a way in conflict with a state court of last resort, the federal circuit courts and controlling decisions of this Court.

The decision of the Seventh Circuit was entered on June 27, 1984. On July 10, 1984, the Petitioners herein were allowed until August 1, 1984, to file a Petition for Rehearing. Said Petition for Rehearing of Respondents-Appellees (Petitioners in this Proceeding), Suggestion for Rehearing in Banc, and Appendix was timely filed on August 1, 1984. The Seventh Circuit denied present Petitioners' Rehearing Petition on September 20, 1984. This petition is timely filed in that it is filed within ninety (90) days of the denial of the Petition for Rehearing and prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. §2101(c) and Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides as follows:

> §1. Citizenship—Due process of law—Equal protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254 provides in relevant part as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> * * *
>
> (d) In any proceeding instituted in a Federal court by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the

factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed by an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

The Indiana Code 35-50-2-8 (Burns 1979), since substantially amended, provided as follows:

Habitual offenders.—(a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two [2] prior unrelated felony convictions. A person who is found to be an habitual offender shall be imprisoned for an additional fixed term of thirty [30] years, to be added to the fixed term of imprisonment imposed under section 3, 4, 5, 6, or 7 [35-50-2-3—35-50-2-7] of this chapter.

(b) After he has been convicted and sentenced for a felony committed after sentencing for a prior

unrelated felony conviction, a person has accumulated two [2] prior unrelated felony convictions. However, a conviction does not count, for purposes of this subsection, if:

(1) It has been set aside; or

(2) It is one for which the person has been pardoned.

(c) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing, under IC 35-4.1-4-3 [35-50-1A-3].

(d) The jury (if the hearing is by jury), or the court (if the hearing is to the court alone), may find that the person is an habitual offender only if the state has proved beyond a reasonable doubt that the person had accumulated two [2] prior unrelated felony convictions.

STATEMENT OF THE CASE

A. Nature of the Case

This petition arises from the reversal on appeal, by the Seventh Circuit, of a judgment by the District Court in *Williams v. Duckworth, et al.*, Cause Number S82-266, in a habeas corpus case under 28 U.S.C. §2254. The Seventh Circuit granted Williams' request for habeas relief unless the state elects to pursue the sentencing charge under the habitual offender statute within a specified period.

B. Course of Proceedings Below

In May, 1979, Bernard Williams a/k/a Anthony Sherrard, was convicted of theft after a jury trial in the Superior Court of Allen County, Indiana, and in a separate hearing was found to be an habitual offender. Williams was sentenced to four (4) years imprisonment for the theft

conviction and was also sentenced on June 22, 1979, to a consecutive term of thirty (30) years imprisonment for being an habitual offender (R.78, 99, 101, 103).[1] His total sentence was therefore thirty-four (34) years.

Williams appealed to the Indiana Supreme Court, raising only a claim that there was insufficient evidence to support the finding that he was an habitual offender. The Indiana Supreme Court held against Williams in a reported opinion on August 25, 1981. *See Williams v. State*, 424 N.E.2d 1017 (Ind. 1981).

On December 15, 1981, Williams filed a Petition for Writ of Habeas Corpus in the United States District Court, Northern District of Indiana, South Bend Division, under cause number S81-430. Because unexhausted issues were raised in the 1981 Petition, the District Court dismissed that case on March 15, 1982, under authority of *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198 (1982).

On June 9, 1982, Williams filed his present habeas corpus application in the United States District Court, Northern District of Indiana, South Bend Division, No. S82-266. In the 1982 Petition, Williams raised a claim that the State had not proved that he was an habitual offender under Indiana law beyond a reasonable doubt. By Memorandum and Order, and Judgment, dated December 28, 1982, the District Court dismissed Williams' case finding no basis for habeas corpus relief. Williams timely filed a Petition for Certificate of Probable Cause and Notice of Appeal, and on January 13, 1983, the District Court declined to issue a certificate of probable cause for appeal. The Seventh Circuit, however, issued such a certificate on August 4, 1983.

After briefing but with no oral argument (Williams was

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[1]In this petition "R." refers to the Record of the Proceedings which was filed on Williams' appeal of his conviction to the Indiana Supreme Court under appellate number 880 S 360.

proceeding *pro se*), the Seventh Circuit reversed the District Court and ordered that "Petitioner's request for habeas relief is granted unless the state elects to pursue the sentencing charge under the habitual offender statute further within 90 days." The sentence in question is thirty (30) years in length. The State's request for rehearing was denied on September 20, 1984. See Appendix, Page A-3. The State sought a stay of the Seventh Circuit's mandate both before and after the denial of rehearing. A stay of its Mandate was ordered by the Seventh Circuit until October 22, 1984, but the Seventh Circuit refused to stay the issuance of its mandate beyond that date. See, Order of October 18, 1984, which is appended hereto at page A-1.

C. Facts Material to the Consideration of the Question Presented

In January, 1979, criminal informations were filed against Bernard Williams for theft and being an habitual offender (R.9, 13). The jury trial concerning the theft charge was conducted on May 24, 1979 (R.137) and culminated in a guilty verdict. Thereafter, on June 22, 1979, a separate hearing was conducted before the same jury concerning the habitual offender count of the criminal information (R.223). Prior to the commencement of the habitual offender hearing, the state trial judge granted the State's motion in limine, which prohibited any mention or comment concerning the sentences received by the Petitioner for his previous convictions (R.35, 37, 244-225, 227-229).

At the beginning of the habitual offender hearing, Count II of the criminal information was read to the jury, and Count II specifically alleged that Williams had been convicted and sentenced with respect to 1971 forgery and 1975 theft charges (R.81). During the hearing, Williams admitted that he had been convicted of forgery and theft, as set forth in Count II of the criminal information filed against him in 1979 (R.280-281). Williams also admitted

that he had served time because of the trouble he had been in as a result of his heroin habit (R.275-277). The trouble inferentially included the forgery and 1975 theft convictions (R.277-278).

Other evidence at the habitual offender hearing revealed that Williams was convicted of forgery, a felony, after a guilty plea on June 8, 1971 (R.240-242, 272). The Petitioner had been sentenced for the forgery conviction (R.245), and the record indicates that sentencing had been set for July 6, 1971 (R.242-244). Williams' second previous and unrelated felony conviction, a theft conviction, was established as having occurred by guilty plea on September 29, 1975 (R.252-253, 256-259, 265, 272). The theft resulting in the 1975 conviction had occurred in November, 1974 (R.266), and sentencing had been set at the time of the guilty plea for November 6, 1975 (R.256). Mr. Williams' act of theft which resulted in his 1979 theft conviction had occurred on or about October 2, 1978 (R.9), and the evidence established that the forgery and 1975 theft convictions had been entirely unrelated (R.246-248, 260, 273). The testimony of the trial judge involved in the proceedings concerning the 1971 forgery conviction and the 1975 theft conviction indicated that those proceedings had been completed (R.270-274). *See also, Williams v. State, supra*, at 1019. The evidence also indicated, without contradiction, that the 1971 forgery and 1975 theft convictions had not been set aside (R.248, 261).

REASONS FOR ALLOWANCE OF THE WRIT

I.

THE SEVENTH CIRCUIT DECIDED THIS CASE IN A WAY IN CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT, PREVAILING FEDERAL CIRCUIT COURT DECISIONS AND THE DECISION OF THE SURPEME COURT OF INDIANA: 1) BY IGNORING THE STATE SUPREME COURT'S INTERPRETATION OF THE INDIANA HABITUAL OFFENDER LAW AND THE STATE COURT FACTUAL FINDINGS; AND, 2) BY FINDING INSUFFICIENT EVIDENCE TO SUPPORT AN HABITUAL OFFENDER DETERMINATION WHEN A RATIONAL TRIER OF FACT COULD HAVE FOUND PROOF OF GUILT BEYOND A REASONABLE DOUBT UNDER ANY REASONABLE CONSTRUCTION OF INDIANA LAW

A. The Seventh Circuit improperly rejected the Indiana Supreme Court's construction of the state habitual offender law

The federal courts, including the Seventh Circuit, have consistently recognized that interpretation of a state statute is a matter within the province and authority of the courts of the state, ultimately the supreme court of the state, in the absence of a clear showing that the construction of the state statute was totally arbitrary or discriminatory. *Green v. Massey*, 706 F.2d 548 (5th Cir. 1983); *United States ex rel. Burnett v. People of the State of Illinois*, 619 F.2d 668 (7th Cir. 1980); *Harkins v. Wyrick*, 589 F.2d 387 (8th Cir. 1979).

In the *Harkins* case, the habeas applicant claimed that the Missouri Supreme Court violated due process by misconstructing the plain language of a state statute. The Eighth Circuit in *Harkins* held that no federal question was presented in this regard, as follows:

> Petitioner also argues that the Missouri Supreme Court violated due process by interpreting the State crediting statute, Mo.Rev. Stat.§546.615, in a manner contrary to its plain language. This argument indicates a misperception of the role of the federal courts in examining habeas corpus petitions of State prisoners. As stated in *Israel v. Odom*, 521 F.2d 1370, 1376 (7th Cir. 1975), "Interpretation of state statutory law is manifestly not a proper function of this court under its habeas corpus jurisdiction. *United States ex rel. Little v. Twomey*, 477 F.2d 767, 770 (7th Cir. 1973), *cert. denied*, 414 U.S. 846, 94 S.Ct. 112, 38 L.Ed.2d 94." A federal court may not simply reinterpret State statutes. To do so would impermissibly invade the autonomy and independence of the States. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-79, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). This court is bound by the determination of the Missouri Supreme Court as to the meaning and application of a Missouri statute. (*Id.*, at 391)

It is notable that the Eighth Circuit cited two Seventh Circuit cases for support of its conclusion. Indeed, the Seventh Circuit has repeatedly held that the construction of state law by a state court is not a proper subject for habeas review. For another example, in *Cramer v. Fahner*, 683 F.2d 1376, 1381-1382 (7th Cir. 1982), the Seventh Circuit rejected petitioner's attempt to attack the interpretation by an Illinois court of certain Illinois statutes relating to an indictment for solicitation of murder. *See also, Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 1568, fn. 21 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977).

As the cases make clear, the Indiana Supreme Court is the court in our federal system vested with the authority to determine what elements must be proven under IC 35-50-2-8 (Burns 1979) for a proper finding that a person is an habitual offender. *Engle v. Isaac, supra*, at 1567-1568.

The Seventh Circuit has circumvented the well-established rule by merely asserting that the Indiana

Supreme Court did not interpret the requirements of the habitual offender law. Appendix, pp. A-16—A-17. The panel's assertion is incorrect, as was properly pointed out by Circuit Judge Pell in his dissent as follows:

> The majority opinion recognizes and agrees with the general proposition that a federal court must defer to a state court's interpretation of its own statute, however, holds here that the Indiana Supreme Court did not interpret the statute but merely found the evidence was sufficient to support the jury's findings. In saying that the evidence was sufficient to prove that Williams had accumulated two prior unrelated felony convictions on its review of that evidence, the Indiana Supreme Court may not have been directly interpreting its own statute but implicitly was doing so by saying that that statute as applied to the facts of the case before it had been sufficient to prove guilt beyond a reasonable doubt. It appears to me that the Supreme Court's analysis, contrary to that of the majority opinion which focused only on the lack of a direct showing of sentencing, placed the gist of the statutory offense on there being two convictions pursuant to the plain language of the Indiana statute.
>
> * * *
>
> (Note: Circuit Judge Pell's citation to IC 35-50-2-8 (Burns 1979) is omitted because it appears in full in the "Constitutional and Statutory Provisions Involved" portion of this Petition).
>
> A careful reading of this statute reflects that eligibility for conviction of being an habitual offender comes about by being convicted of two prior unrelated felonies with the only provision that neither conviction has been set aside or has resulted in a pardon. Indeed, the majority opinion concedes that the sentencing is only implied in the description of the prior unrelated felonies. The sentencing is only in the statute in the indirect sense of timing as to when the judgment of convictions have become final. Here, however, there

was no question that the convictions in both cases had been completed. The trial judge so testified. *Williams v. State*, 424 N.E.2d 1017, 1019 (Ind. 1981). (Appendix, pp. A-18—A-19).

The Dissent of Judge Pell, unlike the majority, recognized that the Indiana Supreme Court interpreted IC 35-50-2-8 (Burns 1979) to require the State to prove only that the criminal defendant had accumulated two (2) prior unrelated felony convictions. The Seventh Circuit has interpreted the statute to require proof of two (2) convictions and *sentences for each prior conviction*. Direct proof of the sentences is not required under the Indiana Supreme Court interpretation. Moreover, the fact that the Indiana Supreme Court did, at least implicitly, interpret the habitual offender statute is apparent from several comments in the opinion of that Court. The Indiana court emphasized that the sole requirement was direct proof of two prior unrelated convictions, in the following passages from the Opinion:

> Appellant also claims that the documents and testimony were insufficient to prove the two prior felony convictions. He claims that the documents were incomplete insofar as they did not set out the penalty imposed.
>
> Defendant had been convicted of forgery in 1971 and of theft in 1975. The State introduced into evidence certified copies of the order book entries in such cases, which showed findings upon guilty pleas. Lawyers who had represented the defendant in those prior proceedings testified that Williams, the appellant here, and the defendant in those proceedings, were one and the same person. The State also established by the testimony of one of the lawyers, that the Defendant had been sentenced on the forgery conviction. The appellant admitted that he had "served time." Appellant Williams testified, "I was convicted of a forgery, yes," and "I do have a theft conviction." The State must, of course, prove that the defendant has

been convicted, or has accumulated two prior unrelated felony convictions. There is sufficient evidence here that the previous convictions of this defendant were final judgments. There was no other evidence regarding the sentencing of the defendant, as the trial judge had determined that since sentencing was not a function of the jury, no mention was to be made of sentencing. *See Griffin v. State*, (1981) Ind., 415 N.E.2d 60; *Debose v. State*, (1979) Ind., 389 N.E.2d 272.

* * *

Even though there was no direct evidence presented regarding the sentencing of the appellant on the theft conviction, there was ample evidence presented that he had been convicted of forgery in 1971 and of theft in 1975, and that he had served time. Other witnesses, including the trial judge, testified that he had been convicted of the two felonies. Judge Busse testified that these causes had been completed and there was no claim that these were not final judgments. The evidence was sufficient to prove that appellant had accumulated two (2) prior unrelated felony convictions (emphasis added). *Williams v. State, supra*, at 1018-1019.

As indicated in the excerpts from the opinion of the Indiana Supreme Court, the prosecution was not required to present direct evidence of the sentence on the second conviction, Williams' theft conviction. The Indiana Supreme Court held only that evidence that the convictions were final was necessary. *Id.*, at 1019. The evidence cited by the Indiana Supreme Court and by Judge Pell in his dissent, Appendix, pp. A-19—A-22, certainly demonstrates that two prior unrelated and final convictions had been proven during the habitual offender hearing. The Seventh Circuit opinion, which requires direct evidence of sentencing for the prior convictions, mandates greater proof than required by state law as interpreted by the Indiana Supreme Court. The Seventh Circuit opinion usurps the authority of the Indiana Supreme Court since

the Indiana court interpretation is rational, not arbitrary (note Judge Pell's dissent, Appendix, pp. A-17—A-19) and since there has been no suggestion that the interpretation is discriminatory. *United States ex rel. Burnett v. People of the State of Illinois, supra.*

B. There was sufficient evidence even under the Seventh Circuit's interpretation of the state requirements

The standard for review for a claim by a state prisoner under 28 U.S.C. §2254 that he has been deprived of due process because of insufficiency of evidence was set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979), as follows:

> We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. §2254—if the settled procedural prerequisites for such a claim have otherwise been satisfied—the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

(Id., at 99 S.Ct., at 2792). Furthermore, in making determinations based on the *Jackson v. Virginia* standard, this Court made it clear that the evidence in the state court record must be viewed in the light most favorable to the prosecution. *Id.*, at 99 S.Ct., at 2789, 2792.

The problem with the Seventh Circuit's opinion is that it fails to view the evidence in the light most favorable to the prosecution. Judge Pell in his dissent, at pp. A-19—A-22, demonstrates that the logical inferences from the record establish that Williams was sentenced on the second felony conviction, the 1975 conviction. The discussion is not reproduced here because the Opinion has been included in the Appendix to this Petition. The State urges the Court to carefully consider Judge Pell's dissent and the Order of the District Court.

Sentencing on the 1975 theft conviction was proved, at least by inference, if one considers the evidence in the light most favorable to the State. Without contradiction, the evidence revealed that Williams had been convicted of forgery, a felony, after a guilty plea on June 8, 1971 (R.240-242, 272), and was sentenced for the forgery conviction (R.245). The record indicates that the sentencing had been set for July 6, 1971 (R.242-244). Williams' second prior felony conviction, a theft conviction, was established as having occurred by guilty plea on September 29, 1975 (R.252-253, 256-259, 265, 272). The theft resulting in the 1975 conviction had occurred in November, 1974 (R.266), and sentencing had been set at the time of the guilty plea for November 6, 1975 (R.256). Williams' act of theft, which resulted in his 1979 conviction, had occurred in October, 1978 (R.9), so that the evidence of record established that the 1971 forgery, 1975 theft, and 1979 theft convictions had been unrelated (R.246-248, 260, 273). As found by the Indiana Supreme Court, Judge Busse (a state trial judge) testified that the two previous criminal actions (1971 and 1975 charges) had been completed (at least by inference) and there was no claim by Williams that these were not final judgments. *Williams v. State, supra*, at 1019; *see also* R.270-274. The record also indicated, again without contradiction, that the 1971 forgery and 1975 theft convictions had not been set aside (R.248, 261). Thus, there was certainly ample evidence to permit any rational or reasonable juror to find that Williams had been convicted of two prior unrelated felonies.

Moreover, the evidence did establish that Williams' 1975 theft conviction had been completed. Such fact was established by the Indiana Supreme Court in its opinion. *See Williams v. State, supra*, at 1019. The Seventh Circuit erroneously rejected this important factual finding, contrary to 28 U.S.C. §2254(d), (e) and (f) and this Court's decision in *Sumner v. Mata*, 449 U.S. 539 (1981), since the finding is supported by the record (Judge Busse's testimony, R.270-274).

Therefore, by inference, Williams was sentenced on the 1975 theft conviction, as a matter of record, since sentencing after conviction is quite obviously an integral part of the completion of any criminal proceeding in Indiana. *Note*, IC 35-4.1-4-2 (Burns, 1979), since repealed. In addition to the above-cited evidence, there are several additional evidentiary factors demonstrating that Williams was properly found to be an habitual offender. It is very significant that Williams admitted before the jury during the course of the habitual offender hearing that he had been previously convicted of forgery and theft, as set forth in Count II of the criminal information filed against him in 1979 (R.280-281). This testimony of Williams on cross-examination was tantamount to an admission that the allegations contained in Count II were correct. Count II, which was read to the jury, specifically alleged that Williams had been convicted *and sentenced* with respect to 1971 forgery and 1975 theft charges. Williams also admitted that he had served time because of the trouble he had been in as a result of his heroin habit (R.275-277). The trouble (at least inferentially) included both the forgery and 1975 theft convictions (R.277-278). In sum, there was evidence (at the very least indirectly) demonstrating that Williams had been sentenced for the 1975 theft conviction. Given all of the above evidence, the District Court was clearly correct in determining that a rational trier of fact could have found Williams to be an habitual offender under Indiana law, even if the Seventh Circuit properly interpreted the requirements of the Indiana law. The Seventh Circuit decision is clearly in error.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari to review the judgment and order of the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 18, 1984.

Before

HON. LUTHER M. SWYGERT, *Senior Circuit Judge*

BERNARD WILLIAMS, A/K/A ANTHONY SHERRARD, *Petitioner-Appellant,*	)	Appeal from the United States District Court for the Northern District of Indiana South Bend Division No. 82 C 0266
NO. 83-1158 *vs.* JACK R. DUCKWORTH, Warden, and INDIANA ATTORNEY GENERAL, *Respondents-Appellees.*	)	Judge Allen Sharp

This matter comes before the court for its consideration of the "MOTION FOR FURTHER STAY OF MANDATE" filed herein on October 11, 1984, by counsel for the respondents-appellees.

The court notes that respondents have previously been granted a stay of the mandate to and including October 22,

1984. The court notes further that once the mandate issues, respondents will have 90 days before they must grant habeas relief to the petitioner pursuant to the mandate of this court. Any petition for certiorari to the Supreme Court is due on or before December 19, 1984. The respondents thus do not require a stay for the purposes of filing a petition for certiorari. Any stay of mandate pending disposition of the petition for certiorari is better presented to the Supreme Court. Accordingly,

IT IS ORDERED that the motion for further stay of mandate is hereby DENIED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 20, 1984.

Before

HON. WALTER J. CUMMINGS, *Chief Judge*
HON. LUTHER M. SWYGERT, *Senior Circuit Judge*
HON. WILBUR F. PELL, JR., *Senior Circuit Judge*

BERNARD WILLIAMS, a/k/a ANTHONY SHERRARD, *Petitioner-Appellant,*	)	Appeal from the United States District Court for the Northern District of Indiana South Bend Division.
No. 83-1158 *vs.* JACK R. DUCKWORTH, Warden, and INDIANA ATTORNEY GENERAL, *Petitioners-Appellees.*	)	No. 82 C 0266 Allen Sharp, Judge.

ORDER

On consideration of the petition for rehearing of the respondents-appellees and suggestion for rehearing en banc, and the answer thereto filed by the petitioner-appellant, a vote by the active members of the court was

requested. No judge voted to grant the suggestion that the matter be reheard en banc.

The members of the original panel voted to deny the petition for rehearing.

It is therefore ORDERED that said petition for rehearing be, and the same is hereby DENIED.

Opinion by Judge Swygert
Judge Pell dissenting

JUDGMENT—WITHOUT ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 27, 1984.

Before

HON. WALTER J. CUMMINGS, *Chief Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. LUTHER M. SWYGERT, *Senior Circuit Judge*

BERNARD WILLIAMS, A/K/A ANTHONY SHERRARD, *Petitioner-Appellant,*	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 83-1158 *vs.*	)	
	)	No. 82 C 0266
JACK R. DUCKWORTH, Warden, and INDIANA ATTORNEY GENERAL, *Respondents-Appellees.*	)	Judge Allen Sharp

This cause came before the Court for decision on the

record from the United States District Court for the Northern District of Indiana, South Bend Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that District Court's denial of petition for writ of habeas corpus is REVERSED and petitioner's request for habeas relief is granted unless the state elects to pursue the sentencing charge under the habitual offender statute further within 90 days, in accordance with the opinion of this Court filed this date.

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-1158

BERNARD WILLIAMS, A/K/A ANTHONY SHERRARD,

Petitioner-Appellant,

v.

JACK R. DUCKWORTH, Warden,
and INDIANA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court for the
Northern District of Indiana, South Bend Division.
No. 82 C 0266—Allen Sharp, *Judge.*

SUBMITTED APRIL 19, 1984*—DECIDED JUNE 27, 1984

Before CUMMINGS, *Chief Judge,* PELL, *Circuit Judge,* and SWYGERT, *Senior Circuit Judge.*

SWYGERT, *Senior Circuit Judge.* Pro se petitioner, Bernard Williams, appeals the denial of his petition for

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). Petitioner has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

a writ of habeas corpus. In his petition, Williams asserts that there was insufficient evidence to support a finding that he was an habitual offender. Ind. Code § 35-50-2-8. The district court rejected that contention. For the following reasons, we hold that there was insufficient evidence to support a finding beyond a reasonable doubt that Williams was an habitual offender. We reverse the district court and grant petitioner's request for habeas relief.

I.

Petitioner Williams was convicted by a jury of theft in the Superior Court of Allen County, Indiana, and in a separate proceeding he was found, by the same jury, to be an habitual offender pursuant to Ind. Code § 35-50-2-8.[1]

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[1] The relevant portion of the statute in effect at the time of the hearing reads as follows:

35-50-2-8 Habitual offenders

Sec. 8. (a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions. A person who is found to be an habitual offender shall be imprisoned for an additional fixed term of thirty (30) years, to be added to the fixed term of imprisonment imposed under section 3, 4, 5, 6, or 7 of this chapter.

(b) After he has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, a person has accumulated two (2) prior unrelated felony convictions. However, a conviction does not count, for purposes of this subsection, if:

(1) it has been set aside; or

(2) it is one for which the person has been pardoned.

(c) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing, under IC 35-4.1-4.3.

(Footnote continued on following page)

Williams was sentenced to four years imprisonment on the theft charge and to a consecutive term of thirty years as an habitual offender.

The petitioner appealed to the Indiana Supreme Court from his conviction as an habitual offender. His sole claim of error was that there was insufficient evidence to support the finding that he was an habitual offender. The Indiana Supreme Court affirmed the conviction by a divided court. *Williams v. State*, 424 N.E.2d 1017 (Ind. 1981).

Williams then filed a habeas petition in the federal district court, raising the same contention he had made in the Indiana Supreme Court. The district court dismissed the petition, finding no basis for habeas relief.

Because petitioner challenges the sufficiency of the evidence presented at the habitual offender proceeding, we will review the evidence presented at that proceeding in some detail.[2]

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[1] *continued*

(d) The jury (if the hearing is by jury), or the court (if the hearing is to the court alone), may find that the person is an habitual offender only if the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated felony convictions.

[2] The state suggests that, as a federal court, we should defer to the state appellate court's factual findings in the absence of any of the enumerated exceptions listed in 28 U.S.C. § 2254(d). *Sumner v. Mata*, 449 U.S. 539 (1981). The state has enunciated the general rule of deferral to state court factual findings. This general rule of deferral, under certain circumstances, may even be applied to sufficiency of the evidence claims, *see Davis v. Franzen*, 671 F.2d 1056 (7th Cir. 1982); *United States ex rel. Green v. Greer*, 667 F.2d 585 (7th Cir. 1981); although 28 U.S.C. § 2254(d)(8) provides that deferral to the state court factual findings is inappropriate where the findings are not fairly supported by the record. The record in the instant case does not fairly support the determination that Williams was sentenced on his second conviction. We do not agree with the state's assertion that Williams has not attacked the factual determinations of the Indiana court.

(Footnote continued on following page)

The habitual offender proceeding[3] commenced with a *motion in limine* by the state to prevent the defense from mentioning the actual sentence the defendant would receive should he be found to be an habitual offender.[4] The court granted the state's motion and, upon a request for clarification, ruled that the motion also pertained to mentioning sentences that the petitioner received on any of his previous convictions.

The evidentiary hearing began with the state calling the attorney who represented petitioner on a 1971 forgery conviction. The attorney, testifying pursuant to a subpoena, stated that he had represented Williams in 1971 on a forgery charge. The attorney identified the defendant as the same person whom he represented in 1971, and testified that Williams had pleaded guilty to the forgery charge. The attorney testified that the petitioner was sentenced on the same charge. The state introduced a copy of the order accepting defendant's guilty plea. The order does not reflect the fact that petitioner was sentenced, but merely sets the date for the sentencing hearing. The attorney also testified that to the best of his knowledge the 1975 charge against defendant appeared to be unrelated to the 1971 forgery conviction.

The next witness called by the state, again testifying under subpoena, was the attorney who represented Williams on a 1975 theft charge. The attorney identified the defen-

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[2] *continued*
Williams's claim, by its very nature, attacks the factual findings by asserting that there was no evidence presented to show that he was sentenced for the second felony conviction. This is a direct challenge to the state court's factual determination that there was sufficient evidence presented to prove that he was sentenced for the second felony conviction.

[3] The habitual offender statute provides for a bifurcated proceeding. The second proceeding is tried before the same jury trying the underlying offense. Ind. Code § 35-50-2-8(c).

[4] The statute does not provide for jury discretion in sentencing on an habitual offender count. The jury is charged only with the determination of whether the defendant is an habitual offender.

dant as the same person whom he represented in 1975. The attorney testified that the petitioner pleaded guilty to the charge. Pursuant to the attorney's identification, the state introduced a document, similar to the one mentioned above, wherein the defendant's guilty plea was accepted. The document sets a sentencing date but gives no indication that sentencing actually occurred. Thereafter, the attorney testified, upon examination of documents relating to the 1971 and 1975 charges, that the charges appeared to be unrelated. The attorney testified that to the best of his knowledge, the guilty plea had neither been set aside, reversed on appeal, nor had a pardon been issued.

The next witness appearing on behalf of the state was Judge Herman Busse, the presiding judge at both petitioner's 1971 and 1975 convictions. The judge was shown docket sheets for both convictions, although the docket sheets were never introduced into evidence. The judge, after being shown the docket sheets, indicated that the petitioner entered a guilty plea in both the 1971 and 1975 proceedings. The judge testified that both were felony convictions. The judge indicated that he probably would not remember the defendant. He did testify that the docket sheets contained his handwriting and that the two convictions were unrelated. At no time was the judge questioned about whether the petitioner had actually been sentenced.

The petitioner testified on his own behalf at the hearing. His testimony attempted to show that his two prior convictions were related because they both stemmed from his addiction to heroin. Upon cross-examination the petitioner testified that he had been convicted of both the 1971 forgery charge and the 1975 theft charge. Williams testified that he had been in serious trouble and that he had "served some time."

II.

A finding by a jury or judge that a person is an habitual offender is not a criminal conviction, it merely provides for the imposition of an enhanced sentence. The determination that a person is an habitual offender, however, is a factual question for a trier of fact, either a judge or a jury. The standard of proof for a finding that a person is an habitual offender, as enunciated in the statute, is proof beyond a reasonable doubt. Ind. Code § 35-50-2-8(d). *Twyman v. State*, 431 N.E.2d 778 (Ind. 1982).

One initial issue we must resolve is whether a challenge to an habitual offender determination is cognizable in a federal habeas petition. As a general rule, a federal court will not review state sentencing determinations that fall within statutory limits. *Solem v. Helm*, 103 S. Ct. 3001 (1983); *Rummel v. Estelle*, 445 U.S. 263 (1980). *Solem* and *Rummel* were Eighth Amendment cases challenging the severity of the sentences imposed. The instant case involves a due process claim: whether the state met its burden of proof in showing that the petitioner was an habitual offender. A sufficiency of the evidence challenge to a state court finding that a person is a recidivist is cognizable in a federal habeas proceeding. *French v. Estelle*, 692 F.2d 1021 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 2108 (1983). Likewise, the claim made here is cognizable in this habeas proceeding.

The standard for federal court review of sufficiency of the evidence claims is set out in *Jackson v. Virginia*, 443 U.S. 307 (1979). A court must determine whether, in viewing the record in the light most favorable to the prosecution, "no rational trier of fact could have found" the facts essential to an habitual offender determination beyond a reasonable doubt. *Id.* at 323. We apply the *Jackson v. Virginia* standard to this sentencing issue because the state requires that an habitual offender finding must be supported by proof beyond a reasonable doubt. *See French v. Estelle*, 692 F.2d at 1024 n.6. The Indiana Supreme Court applies a standard similar to the

one enunciated in *Jackson v. Virginia* to its own review of the record in habitual offender proceedings. In *Twyman v. State*, 431 N.E.2d 778 (Ind. 1982), the Indiana Supreme Court stated that

> [i]n reviewing claims of insufficient evidence, this Court does not weigh the evidence or resolve questions of credibility, but only looks to the evidence and reasonable inferences therefrom which support the verdict. *Smith v. State*, (1970) 254 Ind. 401, 260 N.E. 2d 558. If from that viewpoint there is evidence of probative value from which a reasonable trier of fact could infer that a defendant was guilty beyond a reasonable doubt [of being an habitual offender], we will affirm the conviction. *Glover v. State*, (1970) 253 Ind. 536, 255 N.E.2d 657, *Taylor v. State*, (1973) 260 Ind. 64, 291 N.E.2d 890.

Twyman, 431 N.E.2d at 779. We therefore must decide whether, viewing the evidence in the light most favorable to the state, any rational trier of fact could have found beyond a reasonable doubt that the petitioner was an habitual offender.

III.

Prior to a review of the evidence, we must determine exactly what the state must demonstrate in order to prove beyond a reasonable doubt that a person is an habitual offender. The statute defines an habitual offender in section (b) as follows:

> After he has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, a person has accumulated two (2) prior unrelated felony convictions. However, a conviction does not count, for purposes of this subsection if:
>
> (1) it has been set aside; or
>
> (2) it is one for which the person has been pardoned.

Implicit in the description of a "prior unrelated felony conviction" for purposes of the habitual offender statute are both the conviction and the sentencing. The Indiana Supreme Court has interpreted the statute in that manner. In *Miller v. State*, 417 N.E.2d 339 (Ind. 1981), the Indiana Supreme Court held that:

> [i]t is clear from the statute that to sustain a sentence under it, the State must show that the defendant had been previously *twice convicted* and *twice sentenced* for felonies, . . . (emphasis in the original).

Id. at 342. In *Woods v. State*, 456 N.E.2d 417, 419 (Ind. 1983), the Indiana Supreme Court noted that "the burden of the state in proving the status of habitual criminal is met solely by proof of convictions and sentences. *Spivey v. State*, (1982) Ind., 436 N.E.2d 61."[5]

Under the previous habitual offender statute the state was required to make a showing that the person charged as an habitual offender "had been imprisoned upon the first sentencing prior to the commission of the second offense and that he had been imprisoned upon the second sentencing prior to the commission of the principal offense." *Miller v. State*, 417 N.E.2d at 342. The new statute dispensed with the requirement of imprisonment, thereby allowing a finding of being an habitual offender

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[5] The Amended Information for Habitual Offender itself indicates that the state must demonstrate defendant was twice convicted and twice sentenced. The Information reads in pertinent part:

> . . . On or about the 8 day of June, A.D., 1971, at the County of Allen and in the State of Indiana, in the Circuit Court, one Anthony Sherrard a/k/a Bernard Williams was convicted of a felony, to wit: forgery, . . . and based upon said conviction, Anthony Sherrard a/k/a Bernard Williams was sentenced . . . .
>
> Further, on or about the 29th day of September, 1975, in the Circuit Court of Allen County, State of Indiana, one Anthony Sherrard a/k/a Bernard Williams was convicted of a felony, to wit: theft, . . . and based upon said conviction, Anthony Sherrard a/k/a Bernard Williams was sentenced . . . .

for a person who, for example, received a suspended sentence. *See* Bobby J. Small, Commentary, Ind. Code § 35-50-2-8; *Spivey v. State*, 436 N.E.2d at 63. The requirement of sentencing was expressly retained. *Miller v. State*, 417 N.E.2d at 342. The state's own requirement for finding a person to be an habitual offender is that he was twice convicted and twice sentenced.[6] The question before us, then, is whether the state sustained its burden of showing that petitioner was sentenced on each of the two prior convictions.

Upon a review of the record, we conclude that no rational trier of fact could have found beyond a reasonable doubt that the petitioner was sentenced on the 1975 theft conviction. The evidence that would prove that he was actually sentenced is simply missing from the trial record. The docket sheets, although present at the hearing, were never introduced into evidence. We cannot speculate as to whether they contained information concerning sentencing. Judge Busse, the presiding judge at both prior convictions, did not testify that the petitioner was sentenced on the theft conviction and there is no indication that he ever testified that the proceeding was complete. Petitioner's own testimony that he had "served time," does not lead to the conclusion that he had "served time" on the theft conviction. As the dissent in the Indiana Supreme Court opinion notes, petitioner may have served time on unrelated offenses. The record does not indicate that he "served time" on the theft conviction. *Williams v. State*, 424 N.E.2d at 1020 (Prentice, J., dissenting).

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[6] The statute does not allow the use of a conviction for an habitual offender charge if it has either been set aside or it is one for which the person has been pardoned. Ind. Code § 35-50-2-8(b)(1) and (2). These two exceptions have been construed to be affirmative defenses which must be pleaded and proved by the defendant. *Havens v. State*, 429 N.E.2d 618, 622 (Ind. 1981); *Williams v. State*, 424 N.E.2d at 1018. It is not incumbent upon the state to prove that the conviction has not been set aside or that the defendant has not been pardoned. The Indiana courts have not interpreted the statute to require that lack of sentencing be proved as an affirmative defense by the defendant. *See Williams v. State.*

We note that proof of sentencing on the theft conviction was certainly within the grasp of the prosecutor. A sentence for the first prior conviction was demonstrated when the prosecutor asked petitioner's first attorney, who represented him on the forgery count, whether petitioner had been sentenced. The attorney responded in the affirmative and that testimony clearly supported a finding beyond a reasonable doubt that petitioner had been sentenced on that forgery conviction. That is not the case in respect to the theft charge. We agree with Justice Prentice, the author of the dissenting opinion, who stated that

> [i]t is not the office of this Court to patch holes sometimes left by inexperienced or careless counsel. By doing so, we may be supplying an essential thread which, in fact, was nonexistent.

Id. at 1021. This court should also not patch holes that could have been simply repaired by a properly placed question.[7]

The state argues that we must defer to the state court's interpretation of its own statute and, accordingly, affirm the denial of petitioner's habeas action. While we, of course, agree with the general proposition that a federal court must defer to a state court's interpretation of the state's statute, *United States ex rel. Burnett v. People of the State of Illinois*, 619 F.2d 668 (7th Cir.), *cert. denied*, 449 U.S. 880 (1980), the Indiana Supreme Court did not interpret the statute but found that the evidence was sufficient to support the jury's finding. The Indiana Supreme Court did not squarely address the issue of whether any evidence of sentencing was required; it mere-

[7] The Indiana Supreme Court now requires that proof of prior convictions be supported by record evidence. Parol evidence alone is insufficient to establish a prior conviction absent a showing that the proper records are unavailable. *Morgan v. State*, 440 N.E.2d 1087 (1982). Given available documents, proof of actual sentencing would have beer easy to demonstrate without violating the *motion in limine* preventing any mention of the actual amount of the sentence received.

ly states the evidence was sufficient. We are not bound by that determination. We find that the state failed to prove beyond a reasonable doubt that petitioner was twice convicted and twice sentenced. The finding that he was an habitual offender must therefore be set aside.[8]

IV.

For the foregoing reasons, we reverse the district court's denial of petitioner's petition for a writ of habeas corpus. Petitioner's request for habeas relief is granted unless the state elects to pursue the sentencing charge under the habitual offender statute further within 90 days.

PELL, *Circuit Judge*, dissenting.

Aside from any question of comity, although it would seem that this question should never just be brushed aside in a habeas case, the majority opinion on the facts of this case simply has found a meritorious case for habeas relief with which conclusion I cannot agree. I therefore respectfully dissent.

The majority opinion recognizes and agrees with the general proposition that a federal court must defer to a

[8] We make no determination as to whether the state may properly retry petitioner without implicating petitioner's Double Jeopardy rights. The Indiana Supreme Court has held that where a trial judge has made an improper legal ruling thereby precluding the state from proving its case, when otherwise it could have offered the proper evidence, retrial is appropriate without implicating the Double Jeopardy Clause. *Morgan v. State*, 440 N.E.2d 1087 (Ind. 1982) (the trial judge ruled parol evidence was sufficient to prove prior convictions and the prosecutor relied on the improper legal ruling). It is unclear whether Indiana would consider petitioner's case to be controlled by *Morgan*. We will not consider the issue. *See Burks v. United States*, 437 U.S. 1 (1978) wherein the Supreme Court considered the issue, which we do not decide today, of whether a reversal for insufficiency of the evidence barred retrial in light of the Double Jeopardy Clause of the Constitution. *See also Washington v. Duckworth*, 567 F. Supp. 513 (N.D. Ind. 1983).

state court's interpretation of its own statute, however, holds here that the Indiana Supreme Court did not interpret the statute but merely found the evidence was sufficient to support the jury's findings. In saying that the evidence was sufficient to prove that Williams had accumulated two prior unrelated felony convictions on its review of that evidence, the Indiana Supreme Court may not have been directly interpreting its own statute but implicitly was doing so by saying that that statute as applied to the facts of the case before it had been sufficient to prove guilt beyond a reasonable doubt. It appears to me that the Supreme Court's analysis, contrary to that of the majority opinion which focused only on the lack of a direct showing of sentencing, placed the gist of the statutory offense on there being two convictions pursuant to the plain language of the Indiana statute.

The relevant portion of the statute in effect at the time of the trial read as follows:

> 35-50-2-8 Habitual offenders
>
> Sec. 8 (a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions. A person who is found to be an habitual offender shall be imprisoned for an additional fixed term of thirty (30) years, to be added to the fixed term of imprisonment imposed under section 3, 4, 5, 6, or 7 of this chapter.
>
> (b) After he has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, a person has accumulated two (2) prior unrelated felony convictions. However, a conviction does not count, for purposes of this subsection, if:
>
> (1) it has been set aside; or
>
> (2) it is one for which the person has been pardoned.

> (c) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing, under IC 35-4.1-4.3.
>
> (d) The jury (if the hearing is by jury), or the court (if the hearing is to the court alone), may find that the person is an habitual offender only if the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated felony convictions.

A careful reading of this statute reflects that eligibility for conviction of being an habitual offender comes about by being convicted of two prior unrelated felonies with the only proviso that neither conviction has been set aside or has resulted in a pardon. Indeed, the majority opinion concedes that the sentencing is only implied in the description of the prior unrelated felonies. The sentencing is only in the statute in the indirect sense of timing as to when the judgment of convictions have become final. Here, however, there was no question that the convictions in both cases were final judgments and that the causes had been completed. The trial judge so testified. *Williams v. State*, 424 N.E.2d 1017, 1019 (Ind. 1981). Even if we assume, however, that there must be some direct evidence of sentencing on both convictions, and there is no controversy about the first conviction in 1971, it appears to me that this court should not challenge the holding of the Indiana Supreme Court that there was sufficient evidence on the sentencing for the second conviction also. I turn to the record in that respect and in so doing I accept and adopt the standard as laid down, and as approved by the majority opinion in this case, *Twyman v. State*, 431 N.E.2d 778 (Ind. 1982), in which the Indiana Supreme Court stated that:

> [i]n reviewing claims of insufficient evidence, this Court does not weigh the evidence or resolve questions of credibility, but only looks to the evidence and

> *reasonable inferences therefrom which support the verdict. Smith v. State,* (1970) 254 Ind. 401, 260 N.E.2d 558. If from that viewpoint there is evidence of probative value from which a reasonable trier of fact could infer that a defendant was guilty beyond a reasonable doubt [of being an habitual offender], we will affirm the conviction. *Glover v. State,* (1970) 253 Ind. 536, 255 N.E.2d 657, *Taylor v. State,* (1973) 260 Ind. 64, 291 N.E.2d 890.

Id. at 778 (emphasis added). I have quoted from *Twyman* as it appears in the majority opinion with the exception of the emphasis on reasonable inferences which the majority seems to ignore as existing in this case.

The majority opinion declines to give any significance to Williams' own statement that he had served time, although, of course, as the majority concedes, it is not important that he actually had served time only that he be given a sentence. Nevertheless, the fact that he served time is indicative of the fact that there was a sentence.

A careful reading of his testimony seems to me to provide full support for a reasonable inference that the serving of time to which he referred related to both prior convictions, being the ones here involved. Williams, at the very beginning of his direct testimony, after he gave his name and address testified as follows:

> Q. Is it true, Mr. Williams, that you have been in some trouble before?
>
> A. Yes, it is.
>
> Q. Do you remember exactly which case was which?
>
> A. No, not exactly.
>
> Q. Did—but you have been in some serious trouble before, is that correct?
>
> A. Yes, I have served time.
>
> Q. Is there anything specific to which you attribute the fact that you have been in serious trouble before?

A. Mainly heroin addiction, of which I have since been cured. But at the present times, yes. Both the *offenses* did happen while I was addicted. [Emphasis added.]

It seems to me that the jury correctly concluded, as did the Indiana Supreme Court, from this testimony that Williams himself was referring to "time" for "[b]oth the offenses."

Also, before the jury as an exhibit was the certified copy of court records relating to the 1975 conviction, the final lines of which read as follows:

> Said defendant had a prior pre-sentence investigation report, and now dispenses with such investigation herein at his request.
>
> Sentence is now set for October 6, 1975, at 1:30 P.M.

Sentencing was set for October 6, 1975 and as the Supreme Court pointed out the trial judge had "testified that these causes had been completed and there was no claim that these were not final judgments." 424 N.E.2d at 1019. I fail to see how there could have been a final judgment without sentencing.

These two instances by themselves provide the reasonable inferences to prove beyond a reasonable doubt that Williams indeed was sentenced for the 1975 conviction, which proof, in any event, related only to demonstrating for the timing purposes of the statute the finality of the judgment of the second conviction. The existence of the second conviction, of course, is undisputed.

No one really contends in this case that Williams was not sentenced in 1975 and apparently a direct question to that effect to his 1975 trial attorney, for some reason, was not asked. The prosecutor by asking the simple question would have obviated the problem presented by this case. Because the inferences, however, clearly supported what was undoubtedly the fact, this court has elevated form over substance in granting the writ of habeas corpus. The sentence for being an habitual offender, notwithstand-

ing the various remedial provisions which are capable of substantially shortening periods of confinement, is a severe one, and there should not be sentencing as an habitual offender unless the crime is proven beyond a reasonable doubt. On the other hand, there is no question that Williams was convicted of three felonies within the span of a decade.

The legislative judgment as to the term of the sentence is not an issue before us. Our only concern is whether Williams was denied constitutional due process. The highest court of the state held that he was not convicted improperly under the statute. I agree with that decision.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States District Court

FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

BERNARD WILLIAMS, a/k/a Anthony Sherrard,	)	
Petitioner,	)	
vs.	)	CIVIL NO. S82-0266
JACK DUCKWORTH, Warden and INDIANA ATTORNEY GENERAL,	)	
Respondents.	)	

MEMORANDUM AND ORDER

This case is presently before the Court on a petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2254. The petitioner, Bernard Williams, is an inmate at the Indiana State Prison, Michigan City, Indiana, where he is currently serving a sentence of four years for theft and an additional thirty years for being an habitual offender. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, this memorandum of decision and order constitutes this Court's findings of fact and conclusions of law. The state record has been filed here and carefully examined.

Petitioner raises as his sole ground for relief the contention that Indiana law requires proof of both conviction and sentencing of two or more separate charges before one may be convicted as an habitual offender, but that the evidenced (sic.) produced at his habitual offender

hearing only proved sentencing on one of petitioner's two prior convictions.

Indiana's Habitual offender statute reads as follows:

> 35-50-2-8. Habitual offenders.—(a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two [2] prior unrelated felony convictions.
>
> (b) After he has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, a person has accumulated two [2] prior unrelated felony convictions. However, a conviction does not count, for purposes of this subsection, if:
>
> (1) It has been set aside; or
>
> (2) It is one for which the person has been pardoned.
>
> (c) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing, under IC 35-4.1-4-3 [35-50-1A-4].
>
> (d) A person is an habitual offender if the jury (if the hearing is by jury), or the court (if the hearing is to the court alone), finds that the state has proved beyond a reasonable doubt that the person had accumulated two [2] prior unrelated felony convictions.
>
> (e) The court shall sentence a person found to be an habitual criminal to an additional fixed term of thirty [30] years imprisonment to be added to the term or imprisonment imposed under section 3, 4, 5, 6, or 7 [35-50-2-3—35-50-2-7] of this chapter. If the court finds that ten [10] years or more have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for the last prior unrelated felony conviction and the date he

committed the felony for which he is being sentenced as an habitual offender, then the court may subtract up to twenty-five [25] years from the additional fixed term of thirty [30] years.

(f) If a reduction of the additional thirty [30] year fixed term is authorized under subsection (e), the court may also consider the aggravating or mitigating circumstances in IC 35-4.1-4-7 [35-50-1A-7] to:

(1) Decided (sic) the issue of granting a reduction; or

(2) Determine the number of years, if any, to be subtracted, under subsection (e).

Ind. Code §35-50-2-8 (Burns Ann. 1982).

Paragraph (d) of the above cited statute is the key: "A person is an habitual offender if the jury...finds that the state has proved beyond a reasonable doubt that the person had accumulated two prior unrelated felony convictions." After a lengthy hearing before the jury on petitioner's habitual offender charge, covering more than sixty pages of the record (pp. 223 to 283A), the jury found the petitioner to be an habitual offender (R. 97). Judgment on the jury's verdict was entered accordingly. *Id.*

It is not the role of the federal habeas court to reweigh the evidence produced in a state court proceeding; rather, where sufficiency of the evidence is concerned, the federal habeas court may grant relief only if it determines that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). Further, in viewing the evidence addressed at the state criminal proceeding, the federal habeas court is to construe the state court record in a light favorable to the prosecutor. *Id.*, at 319.

In addition to the above, the Supreme Court has held, in construing 28 U.S.C. §2254(d), that a determination of facts after a hearing on the merits by a state court, evidenced by a written opinion, is to be presumed correct absent proof by

the petitioner that one of eight enumerated exceptions is present. *Sumner v. Mata*, 449 U.S. 539 (1981); *see also United States ex rel. Ross v. Franzen and Wolfe*, 668 F.2d 933, 937 (7th Cir. 1982).

Further, the sufficiency question raised by petitioner deals with a construction of state law (Ind. Code §35-50-2-8). Since it is axiomatic that the highest court in a state is ordinarily the final arbiter of questions relating to the construction of that state's statutes, *United States ex. rel. Burnett v. People of the State of Illinois*, 619 F.2d 668 (7th Cir. 1980), *cert. denied*, 449 U.S. 880, this Court now turns to the language of the decision by the Indiana Supreme Court in petitioner's earlier state appeal:

> The sole issue presented for our review is whether the evidence presented at the habitual offender hearing was sufficient to support the court's finding that appellant was an habitual offender.
>
> [1] That statute provides that enhanced sentences for those found to be habitual offenders, and habitual offenders are therein defined. Ind. Code §35-50-2-8 (Burns 1979) provides as follows:
>
> "(a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions,"
>
> A conviction is excluded if it has been set aside or if it is one for which the offender has been pardoned. Ind. Code §35-50-2-8(b). Appellant contends that it was therefore incumbent upon the State to prove not only that he has accumulated the requisite convictions, but that he had not been pardoned. However, we view the exclusions mentioned as being affirmative defenses to the habitual criminal charge, and hold that the burden is upon the defendant to come forward with such a defense rather than on the state to prove the negative, that the appellant has not been pardoned.

[2] In addition, this precise issue was discussed at trial. It was explained by the court that prior convictions would not count with regard to §35-50-2-8 if in fact there had been a pardon or if the judgment had been set aside. The Court stated:

> COURT: Well, the judgment set aside, the means the conviction is set aside. There is no issue of that in these cases. You are not going to present anything to the effect that any judgment has been set aside, are you?
>
> MR. BEERBOWER: No, we do not intend to.

It is clear that in this case there was no offer of any proof or claim that any judgment had been set aside, or that appellant had been pardoned. There is no error on this issue.

Appellant also claims that the documents and testimony were insufficient to prove the two prior felony convictions. He claims that the documents were incomplete insofar as they did not set out the penalty imposed.

Defendant had been convicted of forgery in 1971 and of theft in 1975. The State introduced into evidence certified copies of the order book entries in such cases, which showed findings upon guilty pleas. Lawyers who had represented the defendant in those prior proceedings testified that Williams, the appellant here, and the defendant in those proceedings, were one and the same person. The State also established by the testimony of one of the lawyers, that the Defendant had been sentenced on the forgery conviction. The appellant admitted that he had "served time." Appellant Williams testified, "I was convicted of a forgery, yes." and "I do have a theft conviction." The state must, of course, prove that the defendant has been convicted, or has accumulated two prior unrelated felony convictions. There is sufficient evidence here that the previous convictions of this defendant were final judgments. There was no other

evidence regarding the sentencing of the defendant, as the trial judge had determined that since sentencing was not a function of the jury, no mention was to be made of sentencing. See, *Griffin v. State* (1981), Ind., 415 N.E.2d 60; *Debose v. State* (1979), Ind., 389 N.E.2d 272. The trial court had ruled on a motion in limine that the jury not be allowed to be advised of penalties or sentences.

[3] The motion in limine read in pertinent part as follows:

> "Wherefore, the State of Indiana respectfully requests the Court to instruct the Defendant and its counsel and witnesses not to mention, refer to, interrogate, concerning or attempt to convey to the Jury in any manner, either directly or indirectly, the penalty or possible sentence for this and related felonies without first obtaining permission of the Court outside the presence and hearing of the Jury..."

Record at 228.

This motion was granted and the defense attorney asked as follows:

> "Your Honor, would I be correct in stating then that we cannot make any reference to the sentencing that just has occurred, nor can the witnesses make any reference to the sentencing on any prior conviction for which he has been convicted of?

Record at 229. The court replied that that would be correct and that the issue was whether or not the defendant had the convictions, not the sentences. This ruling extended the restriction further than necessary, since the general rule relates here to not informing the jury as to the sentence to be imposed for being found to be an habitual criminal rather than to prevent the jury being informed of any previous sentences given on prior convictions. *Griffin, supra, and cases cited therein, Debose, supra.* However, it was

not error in this case to have restricted the mention of any sentences.

> [4] Even though there was no direct evidence presented regarding the sentencing of the appellant on the theft conviction, there was ample evidence presented that he had been convicted of forgery in 1971 and of theft in 1975, and that he had served time. Other witnesses, including the trial judge, testified that he had been convicted of the two felonies. Judge Busse testified that these causes had been completed and there was no claim that these were not final judgments. The evidence was sufficient to prove that appellant had accumulated two (2) prior unrelated felony convictions.
>
> Judgment affirmed.

Williams v. State, ___ Ind. ___, 424 N.E.2d 1017, 1018-19 (1981).

Bearing all of the above carefully in mind, this Court now turns to a review of the evidence presented at the habitual offender hearing.

The record reveals that petitioner entered a plea of "guilty" to the charge of forgery in Allen Circuit Court on June 8, 1971 based on an earlier incident which occurred in a shopping mall in Glenbrook, Allen County, Indiana (R. 240-243). Sentencing on that guilty plea was set for July 6, 1971, and the petitioner was in fact sentenced (R. 245). On September 29, 1975, the petitioner was convicted of a second felony, theft, after entering a guilty plea in Allen Circuit Court (R. 253). Sentencing was set for October 6, 1975 (R. 258). The testimony of the trial judge involved in the 1971 forgery conviction and the 1975 theft conviction was to the effect that those proceedings had been completed (R. 271-2). Further, the record reveals that the convictions for forgery and theft were unrelated, as required by Ind. Code §35-50-2-8(a) (R. 247-8, 260, 273).

Petitioner's third conviction, based on an incident occurring on October 2, 1978 and which forms the basis of this action, is not related to the two prior convictions (R. 9). In light of petitioner's admissions to having been convicted twice earlier (R. 280-81), and his statement that "I have served time," (R. 276), coupled with the other evidence produced at the hearing and noted above, this Court declines to hold that the petitioner has overcome his burden of persuasion as set forth in *Jackson v. Virginia* and *Sumner v. Mata, supra.*

Accordingly, no grounds existing justifying the issuance of a writ of habeas corpus, petition's application for a writ of habea corpus is DENIED. CASE DISMISSED.

Allen Sharp
Chief Judge, United States
District Court

Dated: 12/28/82

JUDGMENT ON DECISION BY THE COURT

FOR THE

United States District Court

NORTHERN DISTRICT OF INDIANA

BERNARD WILLIAMS a/k/a Anthony Sherrard	)	Civil Action Docket No. S82-266,
vs.	)	
JACK DUCKWORTH, Warden INDIANA ATTORNEY GENERAL	)	JUDGMENT

This action came on for hearing before the court, United States District Judge Allen Sharp presiding. The issues having been duly heard and a decision having been duly rendered, it is ordered and adjudged that Petitioner take nothing by his petition and this case is dissmissed.

Dated at:
SOUTH BEND, INDIANA

Date: DECEMBER 28, 1982

RICHARD E. TIMMONS
Clerk of the Court

By Terese M. Hinkle
Deputy

ATTORNEY FOR APPELLANT

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Deputy Public Defender
214 Inland Building
Fort Wayne, Indiana 46802

ATTORNEY FOR APPELLEE

Linley E. Pearson
Attorney General of Indiana

Michael Gene Worden
Deputy Attorney General

C. Ambrose Ramsey
Research Assistant

219 State House
Indianapolis, Indiana

IN THE

Supreme Court of Indiana

BERNARD WILLIAMS, a/k/a ANTHONY SHERRARD,	)	
Appellant,	)	
v.	)	No. 880 S 360
STATE OF INDIANA,	)	
Appellee.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Philip R. Thieme, Judge

PIVARNIK, J.

Appellant was convicted of Theft, Ind. Code §35-43-4-2 (Burns 1979) and found to be an Habitual Offender, Ind. Code §35-50-2-8 (Burns 1979). He was sentenced to a total of thirty-four (34) years imprisonment.

The sole issue presented for our review is whether the evidened presented at the habitual offender hearing was sufficient to support the court's finding that appellant was an habitual offender.

The statute provides for enhanced sentences for those found to be habitual offenders, and habitual offenders are therein defined. Ind. Code §35-50-2-8 (Burns 1979) provides as follows:

> "(a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions."

A conviction is excluded if it has been set aside or if it is one for which the offender has been pardoned. Ind. Code §35-50-2-8(b). Appellant contends that it was therefore incumbent upon the State to prove not only that he had accumulated the requisite convictions, but that he had not been pardoned. However, we view the exclusions mentioned as being affirmative defenses to the habitual criminal charge, and hold that the burden is upon the defendant to come forward with such a defense rather than on the state to prove the negative, that the appellant has not been pardoned.

In addition, this precise issue was discussed at trial. It was explained by the court that prior convictions would not count with regard to §30-50-2-8 if in fact there had been a pardon or if the judgment had been set aside. The Court stated:

> COURT: Well, the judgment set aside, that means the conviction is set aside. There is no issue of that in these cases. You are not going to present anything to the effect that any judgment has been set aside, are you?
>
> MR. BEERBOWER: No, we do not intend to.

It is clear that in this case there was no offer of any proof or claim that any judgment had been set aside, or that

appellant had been pardoned. There is no error on this issue.

Appellant also claims that the documents and testimony were insufficient to prove the two prior felony convictions. He claims that the documents were incomplete insofar as they did not set out the penalty imposed.

Defendant had been convicted of forgery in 1971 and of theft in 1975. The State introduced into evidence certified copies of the order book entries in such cases, which showed findings upon guilty pleas. Lawyers who had represented the defendant in those prior proceedings testified that Williams, the appellant here, and the defendant in those proceedings, were one and the same person. The State also established by the testimony of one of the lawyers, that the Defendant had been sentenced on the forgery conviction. The appellant admitted that he had "served time." Appellant Williams testified, "I was convicted of a forgery, yes." and "I do have a theft conviction." The State must, of course, prove that the defendant has been convicted, or has accumulated two prior unrelated felony convictions. There is sufficient evidence here that the previous convictions of this defendant were final judgments. There was no other evidence regarding the sentencing of the defendant, as the trial judge had determined that since sentencing was not a function of the jury, no mention was to be made of sentencing. *See, Griffin v. State*, (1981) ___ Ind. ___, 415 N.E. 2d 60; *DeBose v. State*, (1979) ___ Ind. ___, 389 N.E.2d 272. The trial court had ruled on a *motion in limine* that the jury not be allowed to be advised of penalties or sentences.

The motion in limine read in pertinent part as follows:

> "Wherefore, the State of Indiana respectfully requests the Court to instruct the Defendant and its counsel and witnesses not to mention, refer to, interrogate, concerning or attempt to convey to the Jury in any manner, either directly or indirectly, the penalty or possible sentence for this and related felonies without

> first obtaining permission of the Court outside the presence and hearing of the Jury...."

Record at 228.

This motion was granted and the defense attorney asked as follows:

> "Your Honor, would I be correct in stating then that we cannot make any reference to the sentencing that just has occurred, nor can the witnesses make any reference to the sentencing on any prior conviction for which he has been convicted of?

Record at 229. The court replied that that would be correct and the issue was whether or not the defendant had the convictions, not the sentences. This ruling extended the restriction further than necessary, since the general rule relates here to not informing the jury as to the sentence to be imposed for being found to be an habitual criminal rather than to prevent the jury being informed of any previous sentences given on prior convictions. *Griffin, supra, and cases cited therein, DeBose, supra.* However, it was not error in this case to have restricted the mention of any sentences.

Even though there was no direct evidence presented regarding the sentencing of the appellant on the theft conviction, there was ample evidence presented that he had been convicted of forgery in 1971 and of theft in 1975, and that he had served time. Other witnesses, including the trial judge, testified that he had been convicted of the two felonies. Judge Busse testified that these causes had been completed and there was no claim that these were not final judgments. The evidence was sufficient to prove that appellant had accumulated two (2) prior unrelated felony convictions.

Judgment affirmed.

Givan, C. J., and Hunter, J., concur.

Prentice, J., dissents with separate opinion in which DeBruler, J., concurs.

IN THE

Supreme Court of Indiana

BERNARD WILLIAMS, a/k/a ANTHONY SHERRARD	)	
Appellant (Defendant Below)	)	
v.	)	No. 880 S 360
STATE OF INDIANA	)	
Appellee (Plaintiff Below)	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Philip R. Thieme, Judge

PRENTICE, J.—Dissenting

While I agree that the burden of proving a pardon or that a conviction had been set aside, Ind. Code §35-50-2-8(b) (Burns 1979), rested with the defendant, I dissent from the remainder of the majority opinion.

Ind. Code §35-50-2-8 (Burns 1979) provides for enhanced sentences for those found to be habitual offenders, and habitual offenders are therein defined in terms of prior convictions and sentences.[1]

1. 35-50-2-8. Habitual offenders.—(a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two [2] prior unrelated felony convictions.

(Footnote continued on following page)

"It is clear from the statute that to sustain a sentence under it, the State must show that the defendant has been previously *twice convicted* and *twice sentenced* for felonies, that the commission of the second offense was subsequent to his having been sentenced upon the first and that the commission of the principal offense upon which the enhanced punishment is being sought was subsequent to his having been sentenced upon the second conviction." *Miller v. State*, (1981) Ind., 417 N.E. 2d 339, 342 (italics in original).

In this case, the State undertook to prove that the defendant had been convicted and sentenced for forgery in 1971 and for theft in 1975. It introduced into evidence certified copies of the order book entries in such cases, which evidenced findings upon guilty pleas as to both prior

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[1] *continued*

A person who is found to be an habitual offender shall be imprisoned for an additional fixed term of thirty [30] years, to be added to the fixed term of imprisonment imposed under section 3, 4, 5, 6, or 7 [35-50-2-3—35-50-2-7] of this chapter.

(b) After he has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, a person has accumulated two [2] prior unrelated felony convictions. However, a conviction does not count, for purposes of this subsection, if:

(1) It has been set aside; or

(2) It is one for which the person has been pardoned.

(c) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing, under IC 35-4.1-4-3 [35-50-1A-3].

(d) The jury (if the hearing is by jury), or the court (if the hearing is to the court alone), may find the person is an habitual offender only if the state has proved beyond a reasonable doubt that the person had accumulated two [2] prior unrelated felony convictions. [IC 35-50-2-8, as added by Acts 1976, P.L. 148, §8, p. 718; 1977, P.L. 340, §121, p. 1533.]

offenses. Transcripts of the sentencings, however, were not introduced.

By the testimony of the lawyers who had represented the defendant in those prior proceedings, the State established that the defendant therein and Defendant (Appellant herein) were one and the same. The State also established by the testimony of one of the lawyers, that Defendant had been sentenced upon the forgery conviction but did not present any evidence that he had been sentenced upon the theft conviction.

The trial court's order in limine was addressed to the defendant and did not restrict the State in presenting evidence of sentencing. The record, however, is devoid of evidence that Defendant had ever been sentenced upon the theft conviction. One could infer that he had been sentenced for some offense from his own admission that he had "served time." However, there is no disclosure with respect to the conviction under which it was served.

Under the statute the State must show a sentencing for each of the alleged prior convictions. The State, however, made no attempt to prove the sentencing circumstantially, for example by showing that the defendant "served time" for two alleged prior felonies and had not "served time" for any conviction other than those charged. For all that can be discerned from this record, Defendant may have served time for unrelated Misdemeanors. A reasonable trier of fact may not infer, beyond a reasonable doubt, Ind. Code §35-50-2-8(d), that a defendant had been sentenced for a specifically alleged prior felony conviction from a naked admission that he had been in jail.

Copies of docket sheets were identified as exhibits and were commented upon by some of the witnesses. It is possible that they disclosed that the defendant had been sentenced upon the theft charge. However, they were never

introduced into evidence and are not part of the record. Further, none of the testimony reveals what the docket sheets evidenced, other than that they did relate to the aforementioned forgery and theft convictions. That the judgments of conviction were identified as final, by Judge Busse, the judge who had presided at the guilty plea hearing, is of no consequence. He merely identified his signatures upon the docket sheets. He also acknowledged that he did not know whether the defendant was the same person who had suffered the convictions shown by such docket sheets. His testimony cannot be regarded as evidence against the defendant.

Upon this state of the record, the finding that the defendant was an habitual offender cannot stand. The finding results in the denial of Defendant's freedom. The quality of proof to sustain such finding is fixed by statute and is the same as that required to sustain a guilty verdict upon a crime charged, *"beyond a reasonable doubt."* The State simply failed to prove one of the required elements. My determination is not arrived at by weighing evidence or determining credibility. Rather, the record is devoid of any evidence from which it can be found, or reasonably inferred, that the defendant has ever been sentenced upon the prior theft conviction. It is not the office of this Court to patch the holes sometimes left by inexperienced or careless counsel. By doing so, we may be supplying an essential thread which, in fact, was nonexistent. The finding, therefore, is contrary to law and a denial of Defendant's constitutional rights to due process of law. The case should be remanded and the defendant re-sentenced.

DeBruler, J., concurs.